

1998

State of Utah v. Melanie E. Pomikala : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF
UTAH
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IN THE UTAH COURT OF APPEALS

980249-CA

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
MELANIE E. POMIKALA, : Case No. 980249-CA
Defendant/Appellant. : Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-506.1 (Supp. 1997), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Pat B. Brian, Judge, presiding.

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH	:	
Plaintiff/Appellee,	:	
v.	:	
MELANIE E. POMIKALA,	:	Case No. 981249-CA
Defendant/Appellant.	:	Priority No. 2

ARGUMENT

I. THE BANK IS NOT A "NATURAL PERSON" UNDER THE PLAIN MEANING OF THE RESTITUTION STATUTE AND THE COURT THEREFORE ERRED IN ORDERING POMIKALA TO PAY RESTITUTION.

The State asserts that the term "natural person" should be construed to include First Security Bank ("Bank") and, on this basis, contends that the trial court did not abuse its discretion in ordering Appellant Melanie Pomikala ("Pomikala") to pay the Bank restitution. See State's Brief ("S.B.") at 6-11. The State bases its analysis on the principles of statutory construction that "a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result.'" S.B.8 (quoting State v. GAF Corp., 760 P.2d 310, 313 (Utah 1988)). From this, the State contends that excluding the Bank from the class of restitution-eligible victims would lead to an absurd result unintended by the legislature. Id. at 9.

Contrary to the State's assertion, however, the Bank is not restitution-eligible under Utah Code Annotated § 76-3-201 (Supp. 1997), Utah's restitution statute. As an initial matter, the State's analysis does not address the primary principle of statutory construction, which is that a statute must first be

construed in light of its plain language, the principal indicator of legislative intent. See Perrine v. Kennecott Min. Corp., 911 P.2d 1290, 1291 (Utah 1996). As explained by the Utah Supreme Court:

We are not to infer substantive terms into the text [of a statute] that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.

Berrett v. Purser & Edwards, 876 P.2d 367, 370 (Utah 1994).

Accordingly,

[f]aced with a question of statutory construction, we examine the plain language of the statute. See Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 520 (Utah 1997). We do not look beyond the plain language unless we find ambiguity. See id. Because we assume that the legislature used each term in the statute advisedly, we read the statute's words literally "unless such a reading is unreasonably confused or inoperable." Savage Indus., Inc. v. Utah State Tax Comm'n., 811 P.2d 664, 670 (Utah 1991).

Olsen v. Samuel McIntyre Inv. Co., 956 P.2d 257, 259 (Utah 1998); see also Appellant's Brief ("A.B.") at 7 (discussing statutory construction). A court may look beyond the plain language of a statute only when a construction under its plain language is "unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute." Perrine, 911 P.2d at 1291.

Under this order of statutory construction, therefore, the State's analysis overlooking the plain language of Utah's restitution statute is misplaced and contravenes clear legislative intent. As an initial matter, and as discussed in Pomikala's opening brief, Appellant's Brief ("A.B.") at Point A, the restitution statute in effect at the time of Pomikala's restitution

hearing (March 6, 1998 - hearing; March 18, 1998 - written court order for restitution) provided in plain and unambiguous language that restitution-eligible victims must be "natural person[s]". Utah Code Ann. § 76-3-201(4)(a)(i) (Supp. 1997) (allowing restitution to "victims of crime" as defined in the Rights of Crime Victims Act); Utah Code Ann. § 77-38-2(9)(a) (Supp. 1997) (Rights of Crime Victims Act) (defining "victim" as "any natural person"). The phrase "natural person" by definition does not contemplate a non-human, corporate entity. A.B.6-7. Black's Law Dictionary similarly equates a "natural person" with a "human being." See Black's Law Dictionary 1142 (6th ed. 1990). Even Utah case law holds that the term "natural person" does not refer to banks, which are corporate entities, as opposed to human beings. See, e.g., Cade v. Zions First Nat'l Bank, 956 P.2d 1073, 1078 (Utah App. 1998) (declining to include bank in definition of "natural person" set forth in National Association of Securities Dealers arbitration code); see also Tracey-Burke Associates v. Department of Employment Security, 699 P.2d 687, 688 (Utah 1985) (discussing distinction between "natural person" and "corporation," the latter being an "artificial entity created by law").

The clarity of the language enacted by the legislature, and hence its intent that "natural person" should include only human beings, is underscored given that the legislature implemented the qualifying term "natural" before "person." Under the general definition section of the Utah Code, the legislature deemed that a "[p]erson" means an individual, public or private corporation,

government, partnership, or unincorporated association." Utah Code Ann. § 76-1-601 (Supp. 1998). By contrast, the legislature enacted the restitution statute with a much narrower definition of "person" in mind to the extent that it adopted the definition used in the Crime Victims Act, which narrowly conceives of "victim" as a "natural person." See Utah Code Ann. § 76-3-201(4)(a)(I); § 77-38-2(9)(a).

If the legislature intended the use of the wider definition of person that the State promotes on appeal with regard to restitution awards, it would have either provided a definition similar to that set forth in the general definition section of the Utah Code (§ 76-1-601) or made reference to section 76-1-601 in the restitution statute itself. The legislature's choice to not do so is indicative of its intent to include the narrower definition of "natural person" as a human, non-corporate entity. See Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 520 (Utah 1997) (where statutory language is clear and unambiguous, courts must "assume that each term . . . was used advisedly"). Moreover, "[i]t is a well-established rule of statutory construction that if two provisions address the same subject and one provision is general while the other is specific, the specific provision controls." State v. Westerman, 954 P.2d 695, 697 (Utah App. 1997) (citations omitted). Where the trial court ignored clearly expressed legislative intent by not following the plain, narrow meaning of "natural person, it erred as a matter of law in ordering Pomikala to pay restitution to the Bank, a non-human, corporate entity. See

id. at 696 (reviewing trial court's restitution order for correctness when "premised on statutory interpretation").

Given the plain and unambiguous language enacted by the legislature defining restitution-eligible victims as "natural persons," the trial court's restitution order, as well as the State's argument on appeal, is in error. Moreover, neither can be justified on the theory that following the plain language of the statute would lead to a result that is "unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute." Perrine, 911 P.2d at 1291. As noted above, the State argues that an absurd result would be reached should this Court follow the plain language of the restitution statute and exclude the Bank as a restitution-eligible victim. To illustrate its point, the State claims that under a literal interpretation, a person who owns a business as an incorporated entity and who is robbed is not eligible for restitution. Id.

The State's claim that this Court should ignore the plain language of the statute in order to avoid an allegedly "absurd" result disregards the fact that it was the legislature's prerogative to define restitution-eligible victims as "natural persons". By the same token, it was the legislature's prerogative to amend the restitution statute after Pomikala's hearing to do away with the "natural person" language that is dispositive here. See A.B. 2 n.1, Point C. As noted by this Court in State v. Westerman, 945 P.2d 695, 699 n.5 (Utah App. 1997), and State v. Stirba, 1998 WL 893234 *4 n.4, with regard to the same restitution

statute at issue here, it is the legislature's role, and not that of the courts, to "enact remedial legislation" if application of the statute pursuant to its plain terms does not render the intended result. Simply because the result does not conform to what the State would like does not mean it is "absurd."¹

In addition, the "absurd" result complained of by the State is not the sort that demands reaching beyond the plain language of the restitution statute. In other cases wherein the Utah Supreme Court has looked beyond the plain language or, in the alternative, rejected a proposed statutory interpretation that did the same, the "absurd" result that the Court sought to avoid was qualitatively different. For example, in Perrine, the Court interpreted the Landowner Liability Act which was intended by the legislature to "free owners [of public and private land, who opened their land to the public for recreational purposes,] of liability for most injuries occurring on their land." 911 P.2d at 1292. Bearing the purpose of the statute in mind, namely to open land up to the public for recreational use, the Court rejected an interpretation of the term "public" that encompassed only a "`particular group.'" Id. at 1293. Instead, the Court found "public" to mean "`open to

¹ In fact, the legislature's decision to not include corporate entities among the class of restitution-eligible victims is reasonable to the extent that corporations, which generally have more money and resources at their disposal, could easily pursue a civil remedy against defendants. By contrast, private persons do not have the same sort of ease of access to legal recourse in the event that they lose money on account of another's illegal behavior. Hence, it makes legislative sense to provide a statutory remedy for "natural persons" as opposed to corporate entities.

all'" for purposes of the benefit of immunity conferred by the Act. Id. In so doing, the Court stated that it gave "effect to the Legislature's underlying intent." Id. at 1292.

Likewise, in Division of Consumer Protection v. GAF Corp., 760 P.2d 310 (Utah 1988), the Court rejected the trial court's reading of a provision of the Consumer Sales Practices Act ("CSPA"), Utah Code Ann. § 13-11-7 & § 13-11-17 (Supp. 1983), because it "essentially eviscerate[d] the Act and defeat[ed] the evident legislative objective of providing an effective remedy to consumers who have purchased defective products and who often have no practical private remedy." Id. at 312. Specifically, the court ruled that the trial court's construction of a certain provision of the CSPA would prevent consumers from recovering thereunder if they filed an independent claim prior to filing of a complaint with the Division of Consumer Protection, the enforcing agency of the CSPA. Id. The Court reasoned that this reading of the CSPA was unreasonable in light of the statute's specific direction that "the enforcing authority shall . . . receive and act on complaints'" at the "behest of consumers." Id. (quoting Utah Code Ann. § 13-11-7(d)).

In light of the foregoing, the practical result of a literal interpretation of "natural person" is not so "absurd or unreasonable," id. at 313, that reaching beyond the plain language would be appropriate. Unlike the rejected interpretations in Perrine and GAF Corp., construing "natural person" to mean only human beings does not wholly eviscerate the purpose of the

restitution statute. In fact, contrary to the State's assertion, it provides a "sensible construction," id., even though it does not conform to the outcome that the State would like to see on appeal. Accordingly, the State's argument on appeal that this Court should reach beyond the plain and reasonable language of the statute is unwarranted.

II. THE BANK IS NOT A DIRECT VICTIM OF POMIKALA'S ACTIONS AND THEREFORE NOT RESTITUTION ELIGIBLE UNDER STATE V. WESTERMAN.

The State likewise asserts on appeal that the trial court did not err in ordering Pomikala to pay restitution because the Bank is a direct victim of Pomikala's fraudulent ATM use. S.B.10. The State ignores the fact that the Bank bears only a contractual relationship with the "immediately and directly aggrieved" victim in this case, Pomikala's grandmother. Westerman, 945 P.2d at 698; see A.B. Point B (discussing why the Bank is not a "direct" victim for purposes of restitution and this Court's Westerman opinion).

By the same token, the State's reliance on State v. Stirba, 1998 WL 893234 (Utah App. 1998), is misplaced. In Stirba, this Court stated in dicta that Judge Stirba misconstrued the restitution statute when she ordered that "a defendant cannot be required to pay restitution . . . to a victim who has already been reimbursed by the victim's insurance carrier." Id. at *4 (quoting Stirba's restitution order). Relying on Westerman, the Court reasoned that Stirba's order was incorrect in that the restitution she denied the victims was to be paid to the victims directly, as opposed to the victims' insurance carrier. Id. at *4 n.4.

"Westerman has no application absent an order specifically requiring that the defendant pay restitution directly to an insurance company." Id.

Unlike the restitution order criticized in Stirba, and contrary to the State's contention on appeal, the trial court's order in this case mandated that Pomikala pay restitution to the Bank although it is not a direct victim of her crime. A.B. Point B. Hence, this case scenario is actually identical to that in Westerman to the extent that it involves an order of restitution payable to a party that bears only a contractual relationship to the actual victim. Id.; Westerman, 945 P.2d at 698-99. Accordingly, as in Westerman, the trial court erred as a matter of law in ordering Pomikala to pay restitution to the Bank where Pomikala did not "personally" perpetrate a crime against the Bank. Westerman, 945 P.2 at 698-99; Utah Code Ann. § 77-38-2(9)(a) (for purposes of restitution, Utah Code Ann. 76-3-201(4)(a)(i), a "[v]ictim of crime' means any natural person against the charged crime . . . is alleged to have been perpetrated . . . by the defendant . . . *personally*").

In light of the foregoing, the State's assertion that the Bank is a "direct" victim for purposes of restitution, and its incidental reliance on Stirba, is incorrect. Accordingly, the trial court erred as a matter of law in ordering Pomikala to pay restitution to the Bank where it was not a direct victim but rather bore only a contractual relation ship to the immediately aggrieved

party, her grandmother.²

CONCLUSION

In light of the foregoing, Pomikala respectfully requests this Court to reverse and vacate the restitution order to First Security Bank.

ORAL ARGUMENT

Pomikala requests oral argument and a published decision which clarifies that the Bank is not a "natural person" or a "direct" victim for purposes of Utah's restitution statute in effect at the time of Pomikala's hearing.

SUBMITTED this 26th day of March, 1999.

Catherine L. Begic
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Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE L. BEGIC, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P.O. Box 140230, Salt Lake City, Utah, 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South,

² The State concedes that the trial court "erred in applying Utah Code Ann. § 76-3-201(4)(a)(i) (Supp. 1998) to defendant's case" since the 1998 amended version of the statute was not in effect until "almost two months" after Pomikala's hearing.

Pomikala submits on her opening brief in response to any other argument made by the State not directly addressed in her reply brief.

Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854,
this 26th day of March, 1999.

Catherine L Begic
CATHERINE L. BEGIC

DELIVERED this _____ day of March, 1999.
